92-1913

Supreme Court, U.S.
FILED
MAY 14 1993
OFFICE OF THE CLERK

DOCKET NO.

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

DANIEL H. OVERMYER -

PETITIONER

vs.

HARVEY S. BARR, AS
TRUSTEE OF DANIEL H.
OVERMYER -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES
COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT
OF CERTIORARI

Daniel H. Overmyer
Petitioner, Pro Se
410 17th Street
Suite 500
Denver, CO 80202
(303) 623-1489

QUESTIONS PRESENTED

Whether §727 (a) (7) of the Bankruptcy Code may be construed to deny a discharge to a Debtor for alleged misconduct in connection with the bankruptcy case of an entity where the alleged misconduct occurred after the period of time that the Debtor was an insider of the bankrupt entity;

Whether §727 (a) (4) of the Bankruptcy Code may be construed to deny a discharge to a Debtor for alleged misconduct in connection with the bankruptcy case of an entity other than the Debtor; and

Whether §727 (a) (3) of the Bankruptcy Code may be construed to deny a discharge to a Debtor who has failed to keep records of a business entity with which he has been affiliated, without any showing or evidence of the adequacy or accuracy of the Debtor's records.

LIST OF PARTIES

All parties to this case are listed in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

REORTS OF OPINIONS viii

OPINIONS BELOW 3

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT . . 7

A. BACKGROUND 8

1. The Disposition in the Bankruptcy Court 8

2. The Telecasting Case. 11

3. The Overmyer Case. 18

B. ANALYSIS 19

1. Section 727(a)(4) of the Bankruptcy Code does not apply to Debtor's conduct in connection with the Telecasting case 19

2. Section 727(a)(7) Does Not Apply to Debtor's Alleged Conduct in the Telecasting Case. 23

3. Telecasting and Overmyer Cases do not Establish that Petitioner Failed to Keep or Falsified Records of his Financial Condition. 28

CONCLUSION 34

TABLE OF AUTHORITIES

Statutes

11 U.S.C. §727(a)(7) . . 3, 50, 20, ... 23, 24

11 U.S.C. §101(31) 13

11 U.S.C. §101(31) 5

11 U.S.C. §101(31)(A) 24

11 U.S.C. §724(a)(4) 19

11 U.S.C. §727 23

11 U.S.C. §727(a) 19

11 U.S.C. §727(a)(2) 23

11 U.S.C. §727(a)(3) . 3, 5, 23, 28

11 U.S.C. §727(a)(4) 3, 5, 19, 21-23

11 U.S.C. §727(a)(4)(B) . . . 21, 22

11 U.S.C. §727(a)(5) 23

11 U.S.C. §727(a)(7) . 3, 5, 20, 23

18 U.S.C. §152 . . . . . 5, 18

28 U.S.C. §1254(1) 4

Rules

Fed.R.Bankr.P. 7056 6

Fed.R.Civ.P. 56 6

Fed.R.Crim.P. 29 20

Cases

Gleason v. Thaw, 236 U.S. 558, 562, 35 S.Ct. 287, 59 L.Ed. 717, 719 (1915) 7

Hadar Leasing Int'l Co. v. D.H. Overmyer Telecasting Co. (In re D.H. Overmyer Telecasting Co.), 23 B.R. 823, 829 (Bankr. N.D. Ohio 1982), aff'd, 53 B.R. 963 (N.D. Ohio), aff'd, 787 F.2d 589 (6th Cir.), aff'd, 787 F.2d 590 (6th Cir. 1986) 11, 12, 14

In re D.H. Overmyer Telecasting Co., 23 B.R. at 823 16

In re Esposito, 44 B.R. 817, 823 (Bankr. S.D.N.Y. 1984) 33

In re Iannelli, 12 B.R. 561, 563 (Bankr. S.D.N.Y. 1981) 33

In re Overmyer Telecasting Co., 23 B.R. at 823 10

In re Overmyer, 121 B.R. 272 (Bankr. S.D.N.Y 1990) 6

See In re Ross, 602 F.2d at 608 (quoting Haize v. Hanover Insurance Co., 536 F.2d 576, 579 (3d Cir. 1976 . 33

See United States v. Overmyer, 899 F.2d at 459 26

United States v. Overmyer, 867 F.2d 937, 938 (6th Cir. 1989), cert. denied, 493 U.S. 813 (1989), appeal after remand, 899 F.2d 457 (6th Cir.), cert. denied, _____ U.S. _____, 111 S.Ct. 344 (1990) 10, 13

Miscellaneous

2 Collier on Bankruptcy §101.31, at 101-87 (15th rev. ed. 1992) . . . 26

REPORTS OF OPINIONS

A. Order of the Second Circuit Court of Appeals, dated February 16, 1993, denying Petitioner's appeal to that Court.

Reported at: Unreported

B. Order on Motion for Reconsideration, entered by the United States Court of Appeals for the Second Circuit on April 7, 1993.

Reported at: Unreported

C. Memorandum and Order entered by the United States District Court for the Southern District of New York, dated July 17 1992.

Reported at: Unreported

D. Judgment dated July 20, 1992.

Reported at: Unreported

E. Decision on Motion for Summary Judgment dated October 29, 1990 by the United States Bankruptcy Court for the Southern District of New York.

Reported at: Unreported

Transcriptions of each of the referenced opinions are attached as appendices.

BEST AVAI

DOCKET NO.

IN THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1992

DANIEL H. OVERMYER -

PETITIONER

vs.

HARVEY S. BARR, AS TRUSTEE OF
DANIEL H. OVERMYER -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO TH
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ABLE COPY

Petitioner, Daniel H. Overmyer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit approving the decision of the United States District Court and the United States Bankruptcy Court for the Southern District of New York.

OPINIONS BELOW

This appeal is from an order dated November 13, 1990 entered by the Honorable Howard Schwartzberg, United States Bankruptcy Judge sitting in the Southern District of New York (the "Bankruptcy Judge"), denying Daniel H. Overmyer (the "Petitioner") a discharge in bankruptcy pursuant to 11 U.S.C. §§ 727(a)(3), 727(a)(4) and 727(a)(7). The Southern District of New York, the Honorable Charles L. Brieant, District Court Judge, affirmed the Order of the Bankruptcy Court denying Debtor's discharge. The Second Court of Appeals affirmed the District Court Order. Copies of these decisions appear as appendices to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 16, 1993. A timely Petition for Rehearing was filed on February 26, 1993. The Court of Appeals' denial of the Petition for Rehearing was issued on April 7, 1993 and is set forth on Appendix B. This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the application and construction of the following provisions of the United States Code: 11 U.S.C. §727(a)(7); 11 U.S.C. §727(a)(3); 11 U.S.C. §727(a)(4); 11 U.S.C. §101(31); and 18 U.S.C. §152. The text of these statutes appears in the Appendix to this Petition.

STATEMENT OF THE CASE

The Petitioner filed his individual petition in bankruptcy under Chapter 7 of the Bankruptcy Code on or about May 29, 1982, in the Southern District of New York. 121 B.R. at 274. This appeal is from the Order of the Bankruptcy Court denying the Petitioner's discharge in bankruptcy, In re Overmyer, 121 B.R. 272 (Bankr. S.D.N.Y. 1990), pursuant to a motion for summary judgment of Harvey S. Barr, as Trustee of Daniel H. Overmyer, (the "Trustee") in accordance with Federal Rules of Civil Procedure 56, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056 (the "Motion"). The Motion sought summary judgment with respect to a complaint filed with the Bankruptcy Court by the Trustee on or about April 24, 1985, (the "Comp-

laint"), which initiated an adversary proceeding in which the Trustee sought denial of the Petitioner's discharge on a variety of grounds. 121 B.R. at 275. The ruling of the Bankruptcy Court was subsequently affirmed by the District Court and the Second Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the opinions below conflict, by implication, with previous decisions of this Court. This Court has previously held that the basis for denial of a discharge to a debtor in a bankruptcy proceeding must be narrowly construed. Gleason v. Thaw, 236 U.S. 558, 562, 35 S.Ct. 287, 59 L.Ed. 717, 719 (1915). ("In view of the well-known purposes of the bankruptcy law, exceptions to the operation of a discharge thereunder should be confined

to those plainly expressed"). The results obtained in the lower courts herein are necessarily predicated upon a broad construction to the applicable statutory exceptions to discharge in contravention of the holdings of this Court.

A. BACKGROUND

1. The Disposition in the Bankruptcy Court

The Trustee's Complaint against the Petitioner sets forth eight claims for relief, of which only two are relevant to this appeal:

> Count 6
>
> The Debtor's discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(4)(A) and 727(a)(7) because the Debtor filed at least one false affidavit with the Ohio Bankruptcy Court in connection with the bankruptcy cases of Hadar and D.H. Overmyer which were filed on March 27, 1981 and November 16, 1973, respectively.

Count 8

> The Debtor's discharge should be denied pursuant to 11 U.S.C. §727(a)(3) because the Debtor concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information from which the Debtor's financial condition or business transactions might be ascertained.

121 B.R. at 275.

In ruling on the Trustee's motion for summary judgment, the Bankruptcy Judge denied the Motion as to all other counts of the Complaint on the grounds that the record when viewed in the light most favorable to the Petitioner did not provide factual support for the allegations of the Trustee as to these counts.

As to Count 6 and Count 8, the Bankruptcy Judge determined that the Petitioner was precluded from disputing the essential elements of those

claims, by the judgments entered in two prior cases: In re Overmyer Telecasting Co., 23 B.R. at 823, (the "Telecasting Case") and United States v. Overmyer, 899 F.2d at 457 (the "Overmyer Case"). That determination necessarily requires liberal construction of the provisions of §727 of the Bankruptcy Code. Specifically, the lower courts' rulings require:

(1) construction of §727(a)(7) to deny a discharge to a Debtor for alleged misconduct in connection with the bankruptcy case of an entity where the alleged misconduct occurred after the period of time that the Debtor was an insider of the bankrupt entity.

(2) construction of §727(a)(3) to deny a discharge to a Debtor who has failed to keep records of a business entity with which he has been affiliated, without any showing or evidence of the adequacy of the Debtor's records; and

(3) construction of §727(a)(4) to deny a discharge to a

Debtor for alleged misconduct in connection with the bankruptcy case of an entity other than the Debtor.

2. The Telecasting Case.

On or about February 6, 1981, D.H. Overmyer Telecasting Co. Inc. ("Telecasting"), an Ohio corporation, filed a petition in the bankruptcy court for the Northern District of Ohio (the "Ohio Court"), Bankruptcy Case No. B81-00506, under Chapter 11 of the Bankruptcy Code and was continued in the operation of its business and the possession of its properties as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. Telecasting was the licensee of UHF television station WDHO-TV in Toledo, Ohio. Hadar Leasing Int'l Co. v. D.H. Overmyer Telecasting Co. (In re D.H. Overmyer Telecasting Co.), 23 B.R. 823, 829 (Bankr.

N.D. Ohio 1982), aff'd, 53 B.R. 963 (N.D. Ohio), aff'd, 787 F.2d 589 (6th Cir.), aff'd, 787 F.2d 590 (6th Cir. 1986) (unpublished dispositions) (see Westlaw for text).

On or about March 27, 1981, Hadar Leasing International Company, Inc. ("Hadar"), an Ohio corporation with principal offices located in New York City, filed a petition in the bankruptcy court for the Southern District of New York, which case was subsequently transferred to the Ohio Court, Bankruptcy Case No. B81-03124. Id. at 828. Hadar was in the business of leasing equipment used in the business of Telecasting.

Both Hadar and Telecasting as well as certain other corporations (the "Overmyer Entities") were determined by the Ohio Court to be controlled by the Petitioner. Id. at

828, 829, 888. However, on March 28, 1981, the Ohio Court awarded the entire operation of Telecasting to the First National Bank of Boston (the "Bank") which was a secured creditor of Telecasting. United States v. Overmyer, 899 F.2d 459 (6th Cir.), cert. denied, _____U.S._____, 111 S. Ct. 344 (1990). From that date onward, the Petitioner had no control over the operations of Telecasting. Id. Accordingly, the Petitioner was not thereafter an "insider" as to Telecasting, as that term is defined in §101(31) of the Bankruptcy Code.

On or about August 7, 1981 (nearly six months after Petitioner was divested of control of Telecasting), Hadar filed a proof of claim against Telecasting in the amount of $859,481.80 (the "Hadar Claim"). United States v. Overmyer, 867 F.2d

937, 938 (6th Cir. 1989), cert. denied, 493 U.S. 813 (1989), appeal after remand, 899 F.2d 457 (6th Cir.), cert. denied, _____ U.S. _____, 111 S.Ct. 344 (1990). The Hadar Claim was subscribed to by an employee of Hadar, David A. Raible ("Raible"). Id. at 937. Raible was also an officer of certain of the Overmyer Entities, and had been an officer and director of Telecasting from 1975 to February 19, 1981, but had no relationship with Telecasting on August 7, 1981. 23 B.R. at 832, 833.

On or about September, 1981, Hadar brought an action against Telecasting in the Ohio Court (the "Action") for relief from the automatic stay so that it could pursue its state law claims against Telecasting. Id. at 826. The Petitioner and certain of the Overmyer Entities intervened as

additional plaintiffs against Telecasting and the Bank intervened as defendant/intervenor. The Bank and Telecasting counterclaimed against Hadar, the Petitioner and the Overmyer Entities. As a result of the various complaints and counterclaims, the Action presented the following issues for resolution by the Ohio Court:

(1) the claim of Hadar against Telecasting for the property and equipment used by Telecasting in the operation of its television station;

(2) the claims of Hadar, the Petitioner and the Overmyer Entities against the Bank arising out of certain loan relationships;

(3) Telecasting's counterclaims against Hadar, the appellant and the Overmyer Entities (a) for a determination that it owned the property and equipment purportedly leased to it by Hadar and (b) for the return of all of the money paid by Telecasting to Hadar pursuant to the leases from Hadar;

(4) the Bank's counterclaims against Hadar, the Petitioner and the Overmyer Entities based upon monies owed to it and allegedly fraudulently removed from the Bank's collateral; and

(5) the Bank's counterclaim for recovery of reasonably collection costs.

Id.

The Ohio Court addressed these five issues in a decision dated September 17, 1982, with judgment entered September 24, 1982, reported as In re D.H. Overmyer Telecasting Co., 23 B.R. at 823, (the "Telecasting Bankruptcy Decision"). The findings of fact and conclusions of law reported in the Telecasting Bankruptcy Decision are voluminous and are not repeated herein in detail. As to the issues identified by the Ohio Court, the Telecasting Bankruptcy Decision determined:

(1) the Hadar Claim against Telecasting, which was sub-

scribed to by Raible, was fraudulent;

(2) the claims of Hadar, the Petitioner and the Overmyer Entities against the Bank were denied;

(3) the ownership of the equipment purportedly leased to Telecasting by Hadar was determined to vest with Telecasting and Telecasting was entitled to the return of all money paid by it to Hadar pursuant to the Hadar leases;

(4) the Bank's counterclaim against Hadar, the Petitioner and the Overmyer Entities was granted, with each such party jointly and severally liable to the Bank for the obligations of the others; and

(5) the Bank was entitled to the costs of collection of its indebtedness, which indebtedness was determined by the Ohio Court to be $22,425,622.99 plus interest.

Id. at 929 et seq.

The Telecasting Bankruptcy Decision was affirmed by the District Court of the Northern District of

Ohio, reported at 53 B.R. at 963, and by the Sixth Circuit in an unreported decision, 787 F.2d at 589.

3. The Overmyer Case.

On January 28, 1986, as a result of the findings by the Ohio Court, the Petitioner was indicted in the Northern District of Ohio on various counts of bankruptcy fraud and related charges. 867 F.2d at 937. Count One of the indictment charged that the Petitioner caused Hadar to file a false proof of claim in the Chapter 11 Bankruptcy of Telecasting, in violation of 18 U.S.C. §152. The elements of that offense are as follows:

> "Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy or attorney, or as agent, proxy, or attorney..." 18 U.S.C. §152.

On November 21, 1986, the jury returned a verdict of "guilty" on count one. All other counts of the indictment were either dismissed before trial pursuant to Rule 29 of the Federal Rules of Criminal Procedure or the Petitioner was determined after trial to be "not guilty". Id.

B. ANALYSIS

1. Section 727(a)(4) of the Bankruptcy Code does not apply to Debtor's conduct in connection with the Telecasting case.

Presentation or use of a false claim may result in the loss of a discharge under §727(a) under two separate and distinguishable subsections. Section 724(a)(4) of the Bankruptcy Code applies to conduct in connection with the Debtor's own bankruptcy case and states as follows:

(a) The court shall grant the debtor a discharge, unless

(4) the debtor knowingly and fraudulently, **in or in connection with the case** -

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

11 U.S.C. §727(a)(4). (Emphasis supplied).

A separate subsection of §727 provides authority for denial of a discharge if a bankrupt has entered a false claim in connection with a bankruptcy case, other than the Debtor's own bankruptcy case. Those provisions are contained in Subsection 727(a)(7) of the Bankruptcy Code which states:

(a) the court shall grant the debtor a discharge, unless -

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider.

Petitioner submits that the only permissible reading of these two subsections, together, mandates that subsection 727(a)(4) must necessarily apply only to the Debtor's conduct in connection with his own case. Therefore, Petitioner's alleged misconduct in connection with the Telecasting case provides absolutely no basis for denial of discharge under §727(a)(4).

This is directly contrary to the District Court's finding that subsection (a)(4)(b) extends to the conduct of the Petitioner in the Telecasting

Case and illustrates the misreading of Section 727(a)(4) by the District Court. The District Court, in its analysis of these issues concluded that the Petitioner was an insider of Telecasting. The District Court found that subsection (a)(4)(B) extends to the conduct of the Petitioner in bankruptcy cases other than Petitioner's individual bankruptcy cases and expressly found that it is no significance to the determinations of the issues in this case that the Petitioner was not an insider of the entity in which it is asserted that he filed false proof of claim, at the time of filing such proof of claim. Accordingly, the District Court confirmed the findings of the Bankruptcy Court upon grounds which are legally incorrect. The opinion of the Second Cir-

cuit adds no further analysis or basis for this claim.

2. Section 727(a)(7) Does Not Apply to Debtor's Alleged Conduct in the Telecasting Case.

As noted above, §727 extends the grounds for denial of discharge to those who have violated the provisions of Subsections 727(a)(2)(3)(4) or (5) in connection with a case other than the Debtor's case, if that case concerns an insider of the Debtor.

It is clear that the alleged filing of the Hadar Claim by Petitioner could not have violated §727(a)(7) of the Bankruptcy Code because on August 7, 1981 the date on which the Hadar Claim was filed against Telecasting, the Petitioner was clearly not an "insider" of Telecasting. The term "insider" is defined by

§101(31)(A) of the Bankruptcy Code, which states:

> (31) "insider" includes -
>
> (A) if the debtor is an individual-
>
> (i) relative of the debtor or of a general partner of the debtor;
>
> (ii) partnership in which the debtor is a general partner;
>
> (iii) general partner of the debtor; or
>
> (iv) corporation of which the debtor is a director, officer, or person in control;

11 U.S.C. §101(31)(A) (emphasis added).

The clear meaning of §101(31)(A) and §727(a)(7) requires that a debtor, such as Petitioner, must have committed a proscribed act with respect to an entity of which he is an officer, director, or person in control, at the time of the proscribed act. The use of the present tense "is" in the definition of "insider" precludes construction of that definition to in-

clude persons who "are now, or have been in the past, an officer, director, or person in control."

A review of the scope of the findings and proceedings in the two principal cases upon which collateral estoppel is based will demonstrate that no finding of insider status by Petitioner at the time of the alleged misconduct can be based upon those earlier cases. The Overmyer Case established that complete voting control of Telecasting was conveyed to the Bank by the Ohio Court in the Telecasting case on March 28, 1981, more than three months before the filing of the Hadar Claim. Thus, as of the date the Hadar claim was filed, the Petitioner was not a director, officer or person in control of Telecasting and therefore was not an "in-

sider." See United States v. Overmyer, 899 F.2d at 459.

Collier on Bankruptcy describes an "insider" generally as "an entity whose close relationship with the debtor subjects any transactions made between the debtor and such entity to heavy scrutiny." 2 Collier on Bankruptcy §101.31, at 101-87 (15th rev. ed. 1992). Obviously, once Telecasting had been conveyed to the Bank, the Bank was fully capable of scrutinizing its relationship with the Petitioner and the Petitioner was not an insider as to Telecasting.

Application of principles of collateral estoppel to the decision in the Overmyer Case does not establish the missing element of insider status. The effect of the jury verdict in that case is only to establish the elements

of the offense found by the jury.

Those elements are:

> "Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy or attorney , or as agent, proxy, or attorney..." 18 U.S.C. §152.

Conspicuously absent from the requirements of this statute is any requirement that the person presenting the claim be an "insider" of the debtor, or related to the debtor in any way. Thus, it is clear that the Overmyer Case does not establish any "insider" relationship between Petitioner and Telecasting, at any time, and in particular does not establish that Petitioner was an insider of Telecasting at the time of filing of the Hadar Claim.

3. <u>The Telecasting and Overmyer Cases do not Establish that Petitioner Failed to Keep or Falsified Records of his Financial Condition</u>.

The Trustee's Eighth Claim for Relief, which serves as an alternative basis for denial of Petitioner's Discharge, states as follows:

> The Debtor's discharge should be denied pursuant to 11 U.S.C. §727(a)(3) because the Debtor concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information from which the Debtor's financial condition or business transactions might be ascertained.

121 B.R. at 275.

Denial of discharge for falsification of books and records is governed by §727(a)(3) of the Bankruptcy Code, which states:

> (a) The Court shall grant the debtor a discharge, unless --
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to

> keep or preserve any recorded information, including books, documents, records and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. §727(a)(3) (emphasis supplied).

Petitioner submits that the record in the cases upon which the Trustee relies to establish the factual basis for his Eighth Claim for Relief were focused upon the records of corporate entities, not the records of the individual debtor, Petitioner in this case. The record is devoid of evidence that the Petitioner concealed, destroyed, mutilated, falsified or failed to keep any information from which his personal financial condition or business transactions might be ascertained. The financial condition

of the Petitioner is set forth in extensive detail in the Petitioner's schedules of his assets and liabilities. There is no finding in any court proceeding that it was "impossible" to ascertain the Petitioner's business transactions and financial circumstances, or that in fact the full extent of his financial condition was not fully disclosed in his Chapter 7 filing. Indeed, it is clear from the extensive factual findings of the Ohio Court on the corporate records between and among the Petitioner and the other corporate entities, that the Petitioner has always kept detailed records of his financial affairs, and accounting therefor.

Similarly, the issue of whether the Petitioner falsified documents from which his financial condition may be ascertained was not raised in the

prior actions. Only the financial condition of the various corporations that were determined to be controlled by the Petitioner was at issue in the preceding litigation. This is because the prior proceedings primarily dealt with the Bank enforcing its claims against the corporations and its secured claim in the stock of D.H. Overmyer Telecasting Co., Inc. and in certain assets of other corporations, and concerned Petitioner's personal liability to the Bank to the extent that he was a guarantor and held to be liable on his guarantee and was held to be responsible for all of the debts of the Overmyer Entities. It was not an issue nor was it established that the financial condition of these corporations had any bearing upon the Petitioner's personal financial condition. For example, the Ohio Court

found that the Petitioner exercised control through a series of related corporations, 23 B.R. at 888, and that many of the intercompany transactions were fraudulent conveyances, the Ohio Court stating that "[w]hile this case involves a host of legal issues, the most important question is whether any or all of Mr. Overmyer's corporate transfers were fraudulent conveyances." 23 B.R. at 916. While finding that Petitioner was the alter ego for all of the corporations he controlled, and hence liable for all of their debts, the Ohio Court did not address non-disclosure of Petitioner's personal financial condition or business transactions. Where the court did find that Petitioner caused the corporations to pay his personal expenses, it also found that the payments were reported to the Internal Revenue Ser-

vice as income to Petitioner. 23 B.R. at 892.

The Petitioner's personal financial condition was not litigated in the preceding actions, the issue was not determined by a valid and final judgment and, finally, the financial condition of the Petitioner was irrelevant to the prior judgment.[1] Accordingly, the Bankruptcy Judge erred in applying collateral estoppel on this issue. See In re Ross, 602 F.2d at 608 (quoting Haize v. Hanover Insurance Co., 536 F.2d 576, 579 (3d Cir. 1976); In re Esposito, 44 B.R. 817, 823 (Bankr. S.D.N.Y. 1984); In re Iannelli, 12 B.R. 561, 563 (Bankr. S.D.N.Y. 1981).

---

[1] The bankruptcy court described the primary goal of the Bank and its attorneys as foreclosing on the stock of Telecasting which had been pledged to the Bank as collateral and preserving the value of the collateral. 23 B.R. at 912.

There is no evidence that the Petitioner filed a false claim in or in connection with his case; there is no evidence that the Petitioner's financial condition or business transactions were impossible to ascertain (or that there was any inaccuracy in his schedules of assets and liabilities); and there is no evidence that the Petitioner was an insider of Telecasting on the only relevant date, the date on which the Hadar Claim was filed. Accordingly, the Bankruptcy Judge clearly erred in applying summary judgment based upon collateral estoppel.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated May 26, 1993.

Daniel H Overmyer

Daniel H. Overmyer, Pro Se